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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-272

FEDERAL DEPOSIT INSURANCE CORPORATION, as successor in interest to Franklin National Bank,
Petitioner,

—v.—

ISRAEL-BRITISH BANK (LONDON) LIMITED, Bankrupt,
Respondent,

and

BANK OF THE COMMONWEALTH,
Respondent.

No. 76-271

BANK OF THE COMMONWEALTH,
Petitioner,

—v.—

ISRAEL-BRITISH BANK (LONDON) LIMITED, Bankrupt,
Respondent,

and

FEDERAL DEPOSIT INSURANCE CORPORATION, as successor in interest to Franklin National Bank,
Respondent.

BRIEF OF RESPONDENT ISRAEL-BRITISH BANK (LONDON) LIMITED, BANKRUPT, IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondent Israel-British Bank (London) Limited, Bankrupt ("IBB") prays that the companion petitions for writs of certiorari by Federal Deposit Insurance Corporation as successor in interest to Franklin National Bank ("FDIC") and Bank of the Commonwealth ("Commonwealth") (herein collectively "Petitioners") be denied.

Opinions Below

The opinions below are adequately stated in the petitions except that the opinion of the Court of Appeals is now reported at 536 F. 2d 509 (2d Cir. 1976).

Jurisdiction

The jurisdictional requisites are adequately set forth in the petitions.

Question Presented

Does the provision of Section 4a of the Bankruptcy Act, 11 U.S.C. § 22(a), which excepts a "banking corporation" from the benefits of the Act as a voluntary bankrupt include a corporation organized under the laws of the United Kingdom, formerly engaged in the banking business with its place of business in London, and which never had a place of business, office or agent but only had assets in the United States, never qualified to do business as a banking corporation in the United States, never did business in the United States as a banking corporation and never was subject to the jurisdiction of any banking authority in the United States—national or state?

Statutes Involved

The statutory provisions involved are:

1. Sections 2a(1), 4 and 67a(1) of the Bankruptcy Act, 11 U.S.C. Sections 11(a)(1), 22 and 107(a)(1).

2. 116(a)(2)(B), Bankruptcy Rules, 1973.

Statement of the Case

Petitioners seek review of the decision of the United States Court of Appeals for the Second Circuit which is set forth in the Joint Appendix (JA-1-a).*

IBB was a British bank organized under the laws of the United Kingdom as a corporation, engaged in the banking business in London. It did no banking business in the United States, nor was it licensed in any state to do such business. It did borrow Eurodollars and U.S. dollars from American banks, including Franklin National Bank ("Franklin") and Commonwealth among others. It also maintained deposits in United States banks.

On July 11, 1974, a loan of Eurodollars was made available to IBB in London by Franklin, the principal and interest amounting to approximately $2,100,000, became due and was not paid. On July 15, 1974, a loan of U.S. dollars made available to it by Commonwealth in New York, in the amount of $500,000 plus interest, became due and was not paid.

On July 22, 1974, Commonwealth started an action against IBB in the Southern District of New York to recover its loan with interest. Commonwealth obtained an order of attachment in the sum of $515,385.42 plus probable interest on the basis of IBB's status as a non-resident defendant. The order of attachment was served on a number of banks in New York holding deposits of IBB.

On July 26, 1974, Franklin followed suit and obtained an order of attachment which was served on a number of banks in New York. Commonwealth made personal service

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* References to the Joint Appendix filed by Petitioners are designated (JA- -).

on IBB in London on August 6, 1974, and obtained a final default judgment for $519,923.90, which was entered in the Southern District on September 11, 1974. Franklin itself is now being liquidated by FDIC.

On August 2, 1974, while these matters were proceeding in the federal court, IBB, being unable to pay its debts, voluntarily filed a debtor's petition for the winding up of its affairs, pursuant to Section 222 of the English Companies Act, 11 & 12 Geo. 6, c. 38 (1948), with the High Court, Chancery Division, of the United Kingdom. In the United Kingdom, companies (corporations) that are unable to pay their debts as they mature cannot be made bankrupt. Bankruptcy Act, 4 & 5 Geo. 5, c. 59, §126 (1914). Accordingly, companies go through the equivalent winding-up procedure prescribed by the Companies Act, 1948.

On August 6, 1974, a receiving order was made by that court constituting Arthur Thomas Cheek, Senior Official Receiver, as Receiver and Provisional Liquidator of the property of IBB.

On September 23, 1974, before Franklin could obtain a judgment, and before Commonwealth could compel payment of the default judgment it had obtained, IBB filed a voluntary petition in bankruptcy in the Southern District of New York under Section 4a of the Bankruptcy Act. IBB's voluntary petition in bankruptcy alleged that it had its principal place of business and its principal assets in London; and that it had property in the Southern District of New York. Upon the filing of its voluntary petition, IBB was automatically adjudicated a bankrupt. Franklin and Commonwealth promptly filed motions to vacate the adjudication and to dismiss the voluntary petition on the ground that the Bankruptcy Court lacked jurisdiction over the subject matter.

The Bankruptcy Court held that IBB as a foreign banking corporation that had not qualified to do business in the United States, or in any state therein, and that never had a place of business there, is a proper person entitled to the benefits of the Bankruptcy Act (JA-1-c through 10-c) and having invoked the jurisdiction of the Court, the Court is vested with jurisdiction over IBB pursuant to Section 2a(1) of the Bankruptcy Act and Rule 116(a)(2)(B) of the Bankruptcy Rules (JA-5-c).

The District Court for the Southern District of New York reversed the orders of the Bankruptcy Court on the ground that as a "banking corporation" IBB comes within the excepted persons who are not entitled to the benefits of the Bankruptcy Act. (JA-1-b through 30-b).

The Court of Appeals concluded that the petition in bankruptcy by IBB should not have been dismissed and accordingly reversed the order of the District Court (JA-1-a through 12-a).

REASONS FOR DENYING THE WRIT

I.

The Issue Decided by the Court of Appeals Is a Very Narrow One and Limited in Its Practical Application and Does Not Justify the Granting of Certiorari.

The issue in the present case is a very narrow one and limited in its practical application. It is whether a bank incorporated in a foreign country undergoing voluntary liquidation under the laws of such country, which is not engaged in business in the United States and hence not regulated by federal or state banking authority, but which has assets in the United States (a bank with such characteristics herein referred to as an "unregulated foreign

bank") is excepted as a "banking corporation" from the benefits of the Bankruptcy Act.

Our concern is not with foreign banking corporations which have been licensed to do business under the laws of a particular state and which are thereby subject to the regulation and supervision of its banking authorities. The number of such regulated foreign banks and the value of their assets, however quantitatively impressive, is irrelevant to the consideration of the question.

Nor is our concern with foreign banks which own all of, or a major interest in, stock in United States banking corporations, engaged in business in a state, even though there were 175 United States banking institutions owned by foreign banks and such United States banking institutions reportedly held assets totaling $57.3 billion (FDIC-5-Note 4).* Such banks are indeed regulated by special state or federal laws dealing specifically with their operation, supervision and liquidation and hence are clearly excepted from the benefits of the Bankruptcy Act. The "growing intimacy between foreign and domestic banking institutions" (FDIC-7) and "the growth of direct investment by foreign banking corporations in United States corporations" (FDIC-5) are clearly unrelated to the question and no prophecy of doom or gloom as to the impact of their liquidation on the stability of our banking system and its importance to our economy can invest the question before this Court with sufficient importance to warrant review by certiorari.

We are here concerned with a bank that never qualified to do business in the United States, owned no interest in United States banking institutions, whose creditors had

* References to the petitions are designated (FDIC-) and (Commonwealth-).

ample warning that the bank was insolvent when, prior to filing its petition under the Bankruptcy Act, it voluntarily sought liquidation under the laws of the United Kingdom because of its insolvency and which thereafter invoked the jurisdiction of the United States Bankruptcy Court to achieve equitable distribution of all of its assets—those located here and abroad—among all of its creditors, domestic and foreign.

To underscore the narrowness of the issue, only four cases of unregulated foreign banks* have surfaced during the entire history of the Bankruptcy Act, despite ". . . the growth of activity in foreign exchange transactions, the growth of domestic credit extended by foreign banking corporations and the growth of direct investment by foreign banking corporations in United States corporations, including domestic banking corporations." (FDIC-5)

Although each case presented the same interesting legal question of statutory construction and fell into the same fact pattern, the question is not one of wide or immediate importance beyond the particular facts and the parties involved, nor one involving "tremendously important principles, upon which are based the plans, hopes and aspirations of a great many people throughout the country" so as to warrant the exercise of certiorari jurisdiction.

> "To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance be-

* The three cases in addition to the instant one have all been instituted in the Southern District of New York: *In the Matter of Bankhaus I.D. Herstatt KGaA iL*, Bankrupt, No. 74 B 1134, an involuntary bankruptcy petition; *Banque de Financement S.A.*, Debtor, No. 75 B 764, a Chapter XI proceeding; and *Israel-British Bank B.M. Tel Aviv* [the Israeli parent of respondent], Bankrupt, No. 74 B 1635 an involuntary bankruptcy petition.

yond the particular facts and parties involved". Address of Chief Justice Vinson before the American Bar Association, September 7, 1949, 69 S.Ct. V. VI.

Each unregulated foreign bank was ordered under the applicable law of its country by its bank supervisory authority to cease business and to liquidate (*Herstatt, supra*); the bank voluntarily sought dissolution (*IBB, IBB Tel Aviv, supra*); or the banking authorities ordered the bank to suspend operations and to apply to the courts to declare itself insolvent (*Financement, supra*).

The instant case and each of the other three cases of unregulated foreign banks have effectively been disposed of by the decision of the Court of Appeals for the Second Circuit, which Petitioner seeks to review. Within the context of Supreme Court Rule 19, the Supreme Court should not exercise its discretion to grant the petitions for certiorari. The decision of the Court of Appeals is not in conflict with the decision of another Court of Appeals on the same matter; nor is there any pending case in any other district or circuit from which such a conflict could arise. The Supreme Court should not grant certiorari to review a decision of a Federal Court of Appeals merely because it is in direct conflict on a point of Federal law with a decision rendered by a District Court, whether in the same circuit or in another circuit, particularly when the decision with respect to which a writ of certiorari is sought as in the instant case is a unanimous decision by a prestigious court—one presiding over the commercial and banking center of the United States and thereby particularly qualified by such experience to deal with the issue under discussion. The Supreme Court tries only to achieve uniformity in Federal matters among the various courts whose decisions are otherwise final in the absence of Su-

preme Court review—the Courts of Appeals, the Court of Claims and the highest State Courts in which decision may be had. It is the duty of the Courts of Appeal to maintain uniformity within their respective circuits and to supervise the decisions of the various District Courts. Where the Supreme Court in granting certiorari had noted the existence of a conflict between the decision of a Court of Appeals and cases in a District Court (see *U.S.* v. *Constantine,* 296 U.S. 287, 290 (1935)) it has done so without suggesting that such a conflict alone would justify the granting of certiorari. At most this type of conflict has been recognized as one factor tending to show the existence of some other and more effective basis for review—such as the importance of the question involved or the fact that the decision of the Court of Appeals is incorrect and contrary to the weight of authority. *Supreme Court Practice* 4th edition—Stern & Gressman; 1969, Section 4.8 at page 162.

II.

There Is No Question of Federal Law Which Justifies the Granting of Certiorari.

Although due recognition is given by the Supreme Court to the importance of the issues involved in the case as to which review is sought, such issues should be and must be of major significance and reflect the more important legal problems within the realm of its jurisdiction. The problem, though intrinsically important, must be beyond the academic or episodic, *Rice* v. *Sioux City Cemetery, Inc.,* 349 U.S. 70, 74 (1954).

Petitioners insist that implicit in the decision of the Court of Appeals, lurks an important question of federal law which this court should settle and to support its position

it sets forth extravagantly remote possible analogies to unregulated foreign banks with respect to which no proceeding is pending in the foreign country or origin for liquidation or rehabilitation of the foreign banking corporation. The mere listing of remote possible analogies such as

> "The likely consequence of another financial crisis similar to that experienced in the latter part of 1974 is that other bankruptcy proceedings involving foreign banking corporations will be filed if the decision below is left undisturbed. Such actions could present real dangers to the stability of our domestic banking system and the international banking community." (FDIC-5)

and

> "But the serious consequences which that decision portends in the field of both local and international banking and finance, as well as for bankruptcy jurisdiction generally, are matters that are of common concern and call for this Court's intervention." (Commonwealth-7)

does not create an important federal question.

In the instant case and each of the other cited cases, proceedings in the country of origin of the bankrupt had already commenced so that the creditors and the public had ample warning that the bank was insolvent and there was little reason for concern that the filing of the petition for bankruptcy would produce any more uncertainty in the banking system in the United States or internationally—than already existed. The threat to the stability of the United States banking system simply did not and could not exist under the facts and circumstances of each case and more particularly the case at bar.

III.

The Decision Is Clearly Correct.

The Court of Appeals correctly determined that subject matter jurisdiction existed under the Bankruptcy Act to adjudicate as a voluntary bankrupt an unregulated foreign bank.

IBB, being unable to pay its debts, voluntarily filed a debtor's petition for the winding up of its affairs in the United Kingdom (JA-3-a). Such filing occurred prior to IBB's filing its voluntary petition under the Bankruptcy Act.

The High Court in England issued an order authorizing the appointment of counsel in New York ". . . to take such steps and to institute such proceedings . . . to insure that the assets of the said company situate in the United States of America become available for the benefit of creditors general." (JA-3-a) The Court of Appeals reasoned that since IBB was entitled to the benefits of the Bankruptcy Act, then the bankruptcy proceedings here would "be in aid of the order of the High Court that the assets in the United States become available to the creditors on the basis of equality" (JA-3, 4-a) because

> "The theme of the Bankruptcy Act is equality of distribution of assets among creditors, *Sampsell* v. *Imperial Paper & Color Corp.*, 313 U.S. 215, 219 (1941); *Buchanan* v. *Smith*, 83 U.S. (16 Wall.) 277, 301 (1873); *3 Collier on Bankruptcy* ¶60.01, at 743; see *Young* v. *Higbee Co.*, 324 U.S. 204, 210 (1945), and correlatively avoidance of preference to some. *1 Remington on Bankruptcy* §17, at 34 (5 ed. J. Henderson 1950). The road to equity is not a race course for the swiftest." (JA-7-a)

The Court of Appeals held that IBB, as a foreign corporation which has assets in the United States is amenable to bankruptcy here under Section 2 of the Act.

> "To find that it is excluded from the general class of entities amenable to bankruptcy one would have to find a reason which illuminates the exception. We can find no convincing reason why a foreign banking corporation, not licensed to do business in the United States, conducting no semblance of a banking business here, and not under the regulatory supervision of any state or federal agency, should not qualify for the benefits of the Act as a voluntary bankrupt." (JA-7-a)

The Petitioners, ignoring the facts of this case, more particularly that IBB was already in a winding up proceeding in the country of its origin and that it filed a *voluntary* petition under the Bankruptcy Act, urge that there is a strong argument to be made for preventing creditors from filing an *involuntary* petition against a foreign banking corporation in the United States in which it is not doing business, because it may be injured thereby through impaired public confidence in its own country. This has no relevance to the initial determination of jurisdiction in the case at bar because the bankrupt filed a *voluntary* petition. Further, it is without merit since a bank which is *in bonis* in its country cannot be put into jeopardy by a mere bankruptcy filing in the United States—certainly not in any more jeopardy than by the filing of attachments in the United States.

On the other hand, if attachments have occurred, timely filing of a petition can become a necessity to invoke the avoiding powers of the Bankruptcy Act for the equal protection of all creditors, domestic and foreign. The Court of Appeals said

> "This is a case where United States creditors could be harmed if preferential liens were permitted to survive." (JA-11-a)

Although the Petitioners were quick to quote from and cite the report of the National Bankruptcy Conference, Special Committee on Insurance Companies and Foreign Banks, Part 1 (FDIC-6, 7, 12) in support of their argument ". . . that the mere commencement of a bankruptcy proceeding in the United States against or by a foreign bank would undoubtedly have a devastating effect upon the particular institution and could impair the confidence of the public in the international banking community and our domestic banking system" (FDIC-6) (none of which happened even in ripple effect in the wake of the four cases that surfaced in the Southern District of New York, a major world and national money center) the Petitioners carefully and conspicuously omitted the only part of the Committee report relevant to the present case. The report comments, at pages 14 and 16:

> "The special characteristics of a bank, coupled with the pervasive supervision and regulation of the banking industry by Federal and State bank supervisory authorities which include special schemes for liquidation of insolvent institutions, amply justify the exemption of *domestic* banks from amenability to the jurisdiction of a bankruptcy court, as provided in present Bankruptcy Act §4 . . .
>
> "The same considerations also apply to *foreign* banks which are licensed by State banking authorities to engage in business in the United States and are subject to liquidation by a U. S. bank supervisory authority. Branches and/or agencies of foreign banks in the United States are permitted only by the laws

of six States—namely, California, Illinois, New York, Massachusetts, Oregon and Washington—where they are subject to supervision by State bank authorities as in the case of domestic banks. If there are deficiencies in the State liquidation procedures relating to foreign banks operating in a particular State, such deficiencies should be corrected by State legislation, as in the case of domestic banks operating in such State. In any event, questions involving the basic structure of the foreign banking industry in the United States are presently under intensive, and in many respects controversial, consideration by the Federal Reserve Board as well as by Congress, and it would be premature for this Committee to make recommendations until the outcome is settled. However, such considerations do *not* apply to a foreign bank which is not licensed in the United States. There is no Federal or State banking regulatory scheme dealing with such a bank or its assets.

"In the case of an unlicensed foreign bank, in order to accomplish the policy of the Bankruptcy Act to secure possession of a bankrupt's assets to effect an equitable distribution among all creditors and to ensure an equitable distribution as between domestic creditors and foreign creditors, there may be situations where the filing of a petition in the United States against the foreign bank may be necessary for the purpose of collecting assets or setting aside preferences or fraudulent transfers. A foreign bank may wish to institute a voluntary proceeding in order to defend itself against a multiplicity of law suits."

Petitioners contend that the Court of Appeals erred in substantially shifting the allocation of power over local property between the state and the federal Government by

denying to the state the power to decide whether to recognize the theme of equality of distribution, adopt some alternative theme, or submit the excepted corporation to dismemberment in the interest of protecting local creditors however great the inequality. To support this contention, they rely heavily on *Clark* v. *Williard*, 294 U.S. 211, 214-15 (1935) and 292 U.S. 112, 123 (1934) (FDIC-10, Commonwealth-10). But this reliance is a distortion of the cited cases without regard to our federal system. The Court of Appeals stated:

"Those cases only held that the full faith and credit clause did not prevent one state from favoring its local levying creditors over a liquidator appointed by another state, insofar as claims to local property were concerned. They were not in any sense an interpretation of the Bankruptcy Act, nor an endorsement of what Justice Cardozo termed 'a policy to allow the assets of an insolvent corporation to be torn to pieces at the suit of rival creditors when they could be distributed equally and without sacrifice at the hands of a receiver.'" (JA-11-a)

These cases elide the essential federalisim implicit in the Bankruptcy Act in reading federal statutes. The Court of Appeals admonished that

"In reading federal statutes, we must also remember that the statutes are written with our federal system in mind. They normally reflect divisions of power between the federal government and the states of the union. Courts over the years have recognized that Section 4 provides for a division of power between the federal government and the states. See *In re Union Guarantee & Mortgage Co.*, 75 F. 2d 984 (2 Cir.), *cert. denied*, 296 U.S. 594 (1935); *Woolsey* v. *Security Trust*

Co., 74 F.2d 334, 337 (5 Cir. 1934); *In re Equity Funding Corp. of America*, 396 F. Supp. 1266, 1275 (C.D. Cal. 1975); *In re Supreme Lodge of the Masons Annuity*, 286 F. 180, 184 (N.D. Ga. 1923)." (JA-8-a)

In Section 4, the Congress, contrary to the contention of the FDIC (FDIC-10), *has* exercised its bankruptcy power in Article 1, Section 8 of the Constitution by making a foreign corporation with assets in the United States amenable to the Bankruptcy Act, and by excluding "banking corporations" from the benefit of the Bankruptcy Act for the reasons found to exist by the Court of Appeals in its examination of legislative history and in its search for Congressional intent. (JA-8-a through 10-a)

It found that there was a legislative purpose for the general exception of banking corporations, but concluded that

> "When the statute is couched in terms of an exception, however, the task is somewhat different, for in the case of an exception we can hardly assume that excluding a particular category from a general class was utterly without purpose. If we find that there was a legislative purpose for the general exception which does not fit the narrower exception at issue, a court may justifiably conclude that the exception at issue is without the statute." (JA-6-a)

It found no Congressional purpose or clear manifestation of intention to command that an unregulated foreign bank, such as IBB be deemed a "banking corporation" within the meaning of Section 4a of the Bankruptcy Act.

> "If we acknowledge, as did the District Court, that Congress failed to consider *foreign* banking corporations when creating the exceptions to eligibility for bankruptcy, are we, nevertheless, required to recognize within the exception what was never in its consideration? There is no plain meaning in 'banking corporation' to compel such a result. See *McBoyle* v. *United States*, 283 U.S. 25 (1931), where Justice Holmes found that an airplane was not a 'motor vehicle' though it was propelled by a motor." (JA-6-a)

In summary, there exists no special and important reason for the Supreme Court to exercise its discretion under Supreme Court Rule 19 to grant the petitions for certiorari. There is no important question of federal law which has not been but which should be settled by this Court, nor has the Court of Appeals decided a federal question in a way in conflict with applicable decisions of this Court, nor has the Court of Appeals departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for this Court's power of supervision. The issue is narrow and applies only to unregulated foreign banks which are already the subject of liquidation or rehabilitation proceedings in the country of origin, a small and relatively unimportant segment of the foreign banking community, which do no business in the United States and merely possess assets here. There is no activity by such unregulated foreign banks that has any impact of significance on the banking activities of state or federal banks in the United States. The exercise of bankruptcy jurisdiction over the assets of such unregulated foreign banks in the United States is a proper exercise under the Bankruptcy Act and the unanimous decision of "the esteemed panel constituting the Court of Appeals in this case" (Commonwealth—6) is correct and should be left undisturbed.

CONCLUSION

For the foregoing reasons, a writ of certiorari should not issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

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